

✓
**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

**ORIGINAL
RECEIVED**

SEP 11 1989

Federal Communications Commission
Office of the Secretary

In re Application of
**COMMUNITY TELEVISION OF
SOUTHERN CALIFORNIA**

For Construction Permit for a
New Television Station on
Channel 39 in Bakersfield,
California

File No. BPET-881012KE

To: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

Theodore D. Frank
George H. Shapiro
Paul J. Feldman
Arent, Fox, Kintner, Plotkin
& Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6016

Counsel for
Community Television of
Southern California

September 11, 1989

RL

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	2
SUMMARY OF ARGUMENT	5
I. The Bakersfield Proposal Would Not Preclude the Use of Channel 39 in Los Angeles	7
II. The Commission Cannot Ignore the Presence of Intervening Terrain in Considering Whether CTSC's Proposal Would Preclude Use of Channel 39 in Los Angeles	12
A. The Commission's Rules Require It To Consider Terrain Roughness Showings	14
B. The Commission Has Regularly Considered Terrain Roughness in Licensing Proceedings.	17
C. Giving Waiver Requests The Required "Hard Look" Obligates the Commission to Consider the Individual Facts, Including Engineering Showings.	20
Conclusion	23

RECEIVED

SEP 11 1989

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Federal Communications Commission
Office of the Secretary

In re Application of
COMMUNITY TELEVISION OF
SOUTHERN CALIFORNIA

For Construction Permit for a
New Television Station on
Channel *39 in Bakersfield,
California

File No. BPET-881012KE

To: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

Community Television of Southern California ("CTSC"), by its attorneys, hereby submits its Petition for Reconsideration of the Commission's action taken by letter dated August 2, 1989 and released on August 10, 1989, (hereinafter, the "Denial") denying CTSC's application for a waiver of the Commission's Advanced Television Systems Freeze Order (Mimeo No. 4074, released July 17, 1987, hereinafter the "Freeze Order") and returning CTSC's application for a new noncommercial television station to operate on Channel *39 in Bakersfield, California (File No. BPET-881012KE).^{1/} As demonstrated below, the Commission's conclusion that CTSC's pro-

^{1/} Simultaneously herewith, CTSC is re-submitting, under separate cover, its application for Channel *39, Bakersfield.

posed operation in Bakersfield might preclude the use of that channel for Advanced Television ("ATV") in Los Angeles is incorrect. The Engineering Statement attached to this Petition demonstrates that the mountainous terrain between Bakersfield and Los Angeles would block any signal from CTSC's proposed Bakersfield station and preclude any interference with the use of Channel 39 in Los Angeles, save in a few locations. In those locations, and indeed throughout the Los Angeles area, the existing signal of Channel 39 in San Diego is significantly stronger than would be the signal of CTSC's proposed Bakersfield station. Furthermore, the Commission's refusal to consider the effect of the terrain between the cities cannot be reconciled with its own decisions and with court decisions defining the Commission's obligation in the context of a waiver request to determine how the public interest will be served. The Denial must be reconsidered and CTSC's waiver request should be granted.

INTRODUCTION

In its July, 1987 Freeze Order, the Commission stated that in order to preserve sufficient broadcast spectrum to insure reasonable options for the implementation of ATV technology, it would temporarily freeze the TV Table of Allotments in areas circumscribed by the minimum co-channel separation distances specified in Section 73.610(b) of the Commission's Rules. Id. at ¶ 2. Thus, the Commission held that applications for construction permits for vacant

television allotments in those areas would not be accepted, although it stated that it would consider waiver requests on a case-by-case basis for noncommercial educational channels. Id. The Order concluded that these actions would preserve spectrum allocation options in areas where the Commission believed that additional station assignments would unduly restrict possibilities for providing additional spectrum for advanced television.

In light of the Commission's indication of a willingness to consider waiver requests for noncommercial proposals, CTSC filed in October 1988 an application for a new noncommercial television station on Channel *39 at Bakersfield, California. Channel *39 is allocated to Bakersfield as that community's only noncommercial channel.^{2/} Because Bakersfield is within 280.8 km of Los Angeles, one of the thirty communities subject to the ATV freeze, CTSC requested a waiver of the Freeze Order on three grounds. First, CTSC noted that a waiver would allow it to provide the first over-the-air noncommercial television service to Bakersfield, a television market with almost 150,000 ADI television households^{3/}, and one of the largest communities in the country

2/ 47 C.F.R. § 73.606.

3/ Broadcasting/Cablecasting Yearbook 1989, at C-147. As noted in Exhibit D of its waiver request, in November of 1987 A.C. Nielsen reported that cable penetration in the Bakersfield market was only 67%. Furthermore, the cable system serving Kern River Valley, which is located in the Bakersfield DMA, has approximately 7% of the market's cable
(continued...)

not to have such a service. Second, CTSC's waiver request noted that its proposal would not affect possible future ATV operations in the Los Angeles area because of the existing preclusionary effect of television Station KNSD, Channel 39, San Diego. Lastly, CTSC noted that extensive terrain blockage by the Tehachapi mountains between Bakersfield and Los Angeles also assured that activation of Channel *39 in Bakersfield would not preclude the use of Channel 39 at Los Angeles for ATV.

While the Commission acknowledged the public interest benefits of providing the first over-the-air noncommercial television service to the Bakersfield area, it nonetheless denied CTSC's waiver request and returned its application as unacceptable for filing on the grounds that the proposal was inconsistent with the possible future use of Channel 39 for ATV in Los Angeles. The Commission first noted that, although spectrum allotment criteria have not yet been developed in the Commission's ATV inquiry, the Commission's Tentative Decision and Further Notice of Inquiry in Advanced Television Systems, 3 FCC Rcd 6520 (1988), "suggested" that co-channel minimum spacing might be reduced to a distance as close as 100 miles. Accordingly, because the Bakersfield proposal is 96.0 miles from Mt. Wilson and Station KNSD

3/(...continued)

subscribers and does not carry either Station KCET or any other noncommercial educational station. Thus, approximately 60,000 of the market television households do not have access to any public television service.

transmits from a location 124.0 miles from Mt. Wilson, the Commission concluded that CTSC's proposal would preclude possible future use of Channel 39 in Los Angeles, while Station KNSD's signal would not have such a preclusionary effect. Further, the Denial noted that the Commission does "not envision consideration of intervening terrain to be a factor in this determination."

SUMMARY OF ARGUMENT

In this Petition, CTSC demonstrates that the Commission's conclusion that grant of CTSC's application might preclude the use of Channel 39 in Los Angeles for high definition television is inaccurate and that its refusal to consider the effect of the terrain between Bakersfield and Los Angeles is inconsistent with its established obligation to evaluate waiver requests on their individual facts to determine whether grant of the waiver will serve the public interest.

As demonstrated in the attached Engineering Statement, grant of the proposed Channel *39 facilities in Bakersfield would not preclude the use of Channel 39 in Los Angeles for high definition television. The Tehachapi Mountain range between the two cities effectively blocks the signal of CTSC's proposed station from reaching the Los Angeles basin. Moreover, the Engineering Statement shows that the signal of Station KNSD is stronger throughout the entire Los Angeles area, both north and south of Mt. Wilson, than would be the

signal from CTSC's proposed Bakersfield station, and thus is more likely than CTSC's proposed station to preclude the use of Channel 39 in Los Angeles for ATV.

Furthermore, the Commission's refusal to consider the effect of terrain cannot be justified. Under the public interest standard of the Communications Act, the Commission is required to give a "hard look" to waiver requests^{4/} and it cannot ignore facts, such as terrain, which directly bear on whether the public interest will be served by grant of the waiver.^{5/} As the Commission is well aware, television signals, particularly UHF signals, cannot penetrate mountains. Yet, the Commission's refusal to consider the effect of the terrain between Bakersfield and Los Angeles effectively assumes that the signals of CTSC's proposed station will achieve that physical impossibility. Moreover,

terrain factors in granting applications, both in the broadcast and other services.^{6/}

Since the Engineering Statement submitted with this Petition establishes that operation of CTSC's proposed Channel *39 station will not have any effect on the availability of Channel 39 for ATV use in Los Angeles, the Commission should reconsider its Denial and grant CTSC's waiver request. In so doing, the Commission will advance its, and Congress', goal of providing public television service to as much of the public as possible by providing public television service to a major, unserved segment of the public.

I. The Bakersfield Proposal Would Not Preclude the Use of Channel 39 in Los Angeles

In the Denial, the Commission stated that the effect of CTSC's proposal on ATV spectrum availability in Los Angeles outweighed the public interest benefits of the introduction of noncommercial educational television service in Bakersfield. However, as the attached Engineering Statement of Dane E. Ericksen demonstrates, grant of CTSC's waiver and construction of its proposed stations will not adversely

^{6/} See, e.g., Central Virginia Educational Television Corp., 49 R.R.2d 435 (1981); Saco River Cellular Telephone Co., 2 FCC Rcd. 2009 (Mob. Serv. Div. 1987). See also Low

affect the availability of Channel 39 for ATV service in the Los Angeles metropolitan area.

The Engineering Statement was prepared as follows. First, the theoretical Grade B coverage of a maximum facility UHF television station transmitting from Mt. Wilson was plotted on a map. (Engineering Statement Figure 1.)^{7/} An omnidirectional pattern was used as a conservative assumption, even though a directional pattern with its main lobe toward the heavily populated Los Angeles basin would undoubtedly be built in actual practice. Within this theoretical contour, two rectangular grids were plotted on the map. The southern grid is composed of 15 mile by 10 mile rectangles with 16 grid points. The northern grid has 14 points created by coarser 20 minute by 20 minute rectangles, reflecting the fact that the area north of Mt. Wilson is sparsely populated.

^{7/} Mt. Wilson was selected as the transmitter site since it is the site of most of the television transmitters serving the Los Angeles area. Engineering Statement at p. 2. CTSC is aware that the Advanced Television Advisory Committee is exploring the feasibility of employing additional spectrum to offer high definition television from non-collocated transmitters, although its feasibility has not been established. However, even if such non-collocated operation is feasible, it is unlikely that any such non-collocated transmitter site would be closer to Bakersfield than Mt. Wilson. As noted in the Engineering Statement, the Mt. Wilson antenna farm is the Los Angeles transmitter site that is closest to Bakersfield, id., and the contour maps of the Los Angeles stations indicate that the stations operating from that site provide the best service to the Los Angeles area. Consequently, any non-collocated transmitter site located closer to Bakersfield is unlikely to provide adequate coverage of the Los Angeles area. Consequently, any non-collocated transmitter will be less likely to receive interference from CTSC's proposed station.

Computer generated terrain profiles were then derived from each point on both grids to both CTSC's proposed Channel *39 site in Bakersfield and KNSD's transmitter site in San Diego, using the National Geophysical Data Center 30-second point topography database. These profiles are shown in Figures 2 and 3 of the Engineering Statement.

Detailed calculations were then prepared predicting the signal strengths to be expected at each grid point from both the proposed Bakersfield operation and from KNSD. These calculations were performed through use of the TIREM II computer program, which evaluates the profile between two sites, and based on the geometry of the profile, selects a model of propagation.^{8/} Because the computer selects the proper propagation model, the result is not biased by an engineer's judgments, unlike the older Technical Note 101 method, which required the engineer to make such choices.

The results of the engineering study are striking. First, the Engineering Statement graphically shows that the Tehachapi mountains would substantially block the penetration of the signal from CTSC's Bakersfield proposal to the Los Angeles area.^{9/} Engineering Statement at 3. According to

^{8/} TIREM II relies on information from a 1983 Department of Commerce study titled "Master Propagation System Users' Manual," Code PB83-178624.

^{9/} CTSC performed this study using its proposed site and facilities, rather than using the reference point or some other site and some other facilities, because this is a waiver request and thus, CTSC submits, its evaluation must
(continued...)

Second, the Engineering Statement also shows that the signal of KNSD alone substantially precludes the use of Channel 39 in Los Angeles. Engineering Statement at 3. For example, KNSD has a predicted signal strength in excess of 19 dBu at 15 of the 30 grid points, and in excess of 64 dBu at 3 points, including point B2 in downtown Los Angeles. Engineering Statement at Figure 4. Furthermore, the Engineering Statement also shows that at 27 out of the 30 grid points, the predicted signal from Bakersfield is less than that from KNSD, and at the 3 points where the predicted signal from Bakersfield is stronger than that from KNSD, the predicted Bakersfield signal is still less than the 19 dBu level, the

turn on the unique facts of CTSC's case. In that connection, CTSC is willing to accept grant of the waiver conditioned on a limitation that any increase in facilities or change of transmitter site will be dependent on CTSC's satisfying whatever rules the Commission might adopt in its pending ATV

level at which it would begin to interfere with a Grade B level signal from operation in Los Angeles on Channel 39.

The conclusions to be drawn from these calculations are clear. First, due to terrain blockage by the Tehachapi mountains, signals from the proposed Bakersfield operation would not preclude the use of Channel 39 in Los Angeles. Second, because of the strength of KNSD's signal in Los Angeles, the Commission cannot, as it does in the Denial, rely on the fact that KNSD is more than 100 miles from Mt. Wilson as a basis for its assertion that KNSD's signal does not preclude the use of Channel 39 in Los Angeles while CTSC's proposal will. If, in the face of this data, the Commission insists that KNSD's use is not preclusive, then it should recognize that the proposed Bakersfield operation also would not be preclusive, since its signal strength would be less than that of KNSD in 27 of the 30 grid points, and below the interfering 19 dBu level of the remaining three points.^{10/}

^{10/} Subsequent to the filing of this application, the Commission accepted for filing a translator application filed by Station KMTF in Fresno that proposes to serve Bakersfield. See Report No. GF89-4, released August 1, 1989, noting application of KMTF, Channel 18, Inc. (BPTT-JC0624QF). CTSC has petitioned to deny that application, based in part on interference to land mobile operations in the Los Angeles area. Because the antenna height above mean sea level of the KMTF translator is 7,582 feet, in contrast to 3,678 feet for CTSC's Channel 36 application, the terrain blockage considerations, if any, that may be applicable between the KMTF translator site and Los Angeles would be considerably different from those applicable here. In any event, KMTF had the burden of establishing terrain blockage, if it exists, and it made no such showing.

The Commission's policy, as set forth in its Freeze Order, is to preserve spectrum for possible future ATV use. Freeze Order ¶ 3. CTSC has shown both that the strength of KNSD's signal in the Los Angeles area renders Channel 39 unavailable for ATV use in Los Angeles and that even if it does not, the terrain between Bakersfield and Mt. Wilson effectively blocks the signal of CTSC's proposed Bakersfield station such that it will not interfere with ATV use of Channel 39 in Los Angeles. Consequently, grant of CTSC's waiver request will jeopardize the objectives underlying the Freeze Order. Because of the public interest benefits of CTSC's proposed service, as recognized by the Commission in the Denial, and because CTSC's station will not adversely affect the use of Channel 39 for ATV in Los Angeles, the Commission should grant CTSC's waiver and accept its application.

II. The Commission Cannot Ignore the Presence of Intervening Terrain in Considering Whether CTSC's Proposal Would Preclude Use of Channel 39 in Los Angeles

As a part of its request for waiver, CTSC made a showing that no preclusion as to the use of Channel 39 in Los Angeles would result from the granting of CTSC's application since the presence of the Tehachapi mountain range between Bakersfield and Los Angeles would block television signals between those two cities. See Application of CTSC, Exhibit D at 3. In response to this argument, the Commission tersely

noted that "the ATV spectrum availability studies currently do not include consideration of intervening terrain." While this may be an accurate report on the status of the Commission's ATV studies, it does not provide a basis for treating as irrelevant a legitimate showing of relevant facts made in the context of a licensing proceeding and pursuant to Commission Rules. In light of the detailed showing provided in the attached Engineering Statement, the Commission can no longer ignore the effect of the Tehachapi Mountains on the issues in this proceeding: to do so would be contrary to the principle established in WAIT Radio v. F.C.C., 418 F.2d 1153 (D.C. Cir. 1969) that allegations stated with clarity and accompanied by supporting data are not subject to perfunctory treatment, but must be given a "hard look." Furthermore, as shown below, ignoring CTSC's showing regarding intervening terrain would ignore important Commission and other Federal court precedent.

The Commission's response that "the ATV spectrum availability studies currently do not include consideration of intervening terrain" indicates that the Commission did not consider CTSC's showing of terrain blockage. It is not clear why the Commission would choose to ignore that showing: there is no doubt that the Tehachapi mountains are there, and there certainly is nothing mysterious or unusual about CTSC's theory: the Commission itself has stated on numerous occasions that mountains may severely limit the service range of

a station to be protected as well as substantially attenuate a potentially interfering signal.^{11/} The Commission has also noted that the signals of UHF stations are particularly susceptible to this phenomenon.^{12/}

Thus, the Commission's refusal to even consider CTSC's terrain blockage showing ignores basic laws of physics as acknowledged by the Commission. While CTSC's initial engineering study made a limited showing due to its reliance on these basic principles, in light of the Commission's Denial, it has commissioned the further study of the matter described above. That detailed and comprehensive study is so compelling that it cannot be ignored by the Commission.

A. The Commission's Rules Require It To Consider Terrain Roughness Showings

The Denial's treatment of CTSC's prior terrain shielding showing cannot be reconciled with Section 73.684(f) of the Commission's rules. That rule governs the prediction of television signal coverage and states in part:

In cases where terrain in one or more directions from the antenna site departs widely from the average elevation of the 3.2 to 16.1 kilometers... sector, the prediction method may indicate contour distances that are different from what may be expected in practice. For example, a mountain ridge may

^{11/} See, e.g., Memorandum Opinion and Order and Notice of Proposed Rulemaking in Docket 20418 ("VHF Drop-ins"), 63 F.C.C.2d 840, 858-59(1977). See also Television Channel Allotments, Notice of Proposed Rulemaking, 83 F.C.C.2d 51, 107-08 (1980).

^{12/} See Television Channel Allotments *supra* at 65.

indicate the practical limit of service
although the prediction method may indicate
otherwise. In such case, the prediction
method should be followed, but supplemented

**B. The Commission Has Regularly Considered
Terrain Roughness in Licensing Proceedings**

Commission precedent shows that the Commission has granted waivers of its rules and authorized facilities based on those showings. In Central Virginia Educational Television Corp., 49 R.R.2d 435 (1981), the Commission considered an application for a construction permit for a noncommercial UHF television station that required a waiver of the Section 73.610(d) mileage separation requirements. The Commission granted the waiver request and the construction permit, noting that it was "convinced that the interposition of the Blue Ridge and Bull Run Mountains would be likely to eliminate any potential sound-image interference [with the short-spaced stations]" Id. at 436.^{13/}

^{13/} The Commission has also demonstrated that it is willing to consider terrain shielding showings in waiver requests concerning the protection of UHF signals in Bakers-

Terrain shielding showings have also been used as a basis for a waiver from the Commission's multiple ownership rules, thus allowing an applicant to be granted a VHF construction permit. See Liberty Television, 18 F.C.C. 2d 924 (Rev. Bd. 1969), rev. denied FCC 69-1306 (released December 2, 1969), reh'g. denied 21 F.C.C.2d 601 (1970). The Commission has also allowed terrain shielding showings to be used to support waivers of its must-carry and non-duplication rules. See Potomac Valley Telecasting Corp., 21 F.C.C.2d 851 (Rev. Bd. 1970), recon. denied 24 F.C.C.2d 233 (Rev. Bd. 1970); rev. denied FCC 70-530 (released May 20, 1970).^{14/}

13/ (...continued)
waivers:

...we shall also consider whatever technical proposal an applicant might make to reduce or eliminate objectionable interference. This is a departure from our past policy of considering technical means of reducing or eliminating predicted interference, only after other public interest considerations outweighing the short-spacing have been demonstrated. [cite omitted] We believe that relegating evaluation of this factor until after the shortfall has been approved unduly minimizes its importance....

Id. at 3657.

^{14/} See also Bluefield Television Cable, 10 F.C.C.2d 731,732 (1967).

The Commission has also considered terrain showings in requests for waivers of Section 22.903(a) of its rules, which prohibits extension of cellular service beyond the boundaries of the applicable Metropolitan Statistical Area. See Saco River Cellular Telephone Company, 2 FCC Rcd 2009 at ¶ 4 (Mob. Serv. Div. 1987); Application of Centel Cellular Company of Hickory, dated Aug. 17, 1987 (KNKA 436). See also (continued...)

Lastly, the Commission's refusal to consider terrain here is contrary to the policy adopted recently in Low Power Television Terrain Shielding Policy Statement, 3 FCC Rcd. 2664 (1988). In that decision, the Commission stated that it would consider, on a case-by-case basis, requests for waivers of its minimum spacing rules on the grounds of terrain shielding in order to promote improved television service in western mountainous areas. Id. at 2665. The Commission noted that, while it had initially refused to consider terrain showings, that decision was necessary because the volume of applications for LPTV and translator stations had made it administratively impossible to consider individual waiver requests if efficient processing of applications was to be maintained. Id. Now, as the volume of applications diminished, the Commission has determined that it would begin to consider terrain.

In contrast, there have been relatively few requests for waiver of the ATV freeze, and the Commission has encouraged noncommercial applicants to submit waiver requests in appropriate cases. It is difficult to perceive why, in these circumstances, a showing of terrain blockage would receive less consideration when submitted with an application proposing a first off-the-air noncommercial television operation for one of the largest cities in the country without

14/(...continued)
Johnstown Cellular Communications Co., 1 FCC Rcd 1164 at ¶ 16, fn. 12 (Mob. Serv. Div. 1986).

such service,^{15/} when such showings are now routinely considered when appended to low power television and translator applications in western mountainous areas.

Commission precedent allows the use of terrain showings to support waiver requests in a variety of areas. The Commission cannot act differently here.

**C. Giving Waiver Requests The Required "Hard Look"
Obligates the Commission to Consider the
Individual Facts, Including Engineering Showings**

Court cases reviewing Commission actions also show that the Denial's terse statement that ATV spectrum availability studies do not currently include considerations of terrain is not a sufficient basis for ignoring CTSC's terrain shielding showing. In remanding back to the Commission a case in which it had denied a waiver request with similarly perfunctory language, the D.C. Circuit stated:

... a general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy served by the rule, that has been adjudged in the public interest. An agency need not sift pleadings and documents to identify such applications, but allegations ... stated with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a "hard look."

^{15/} According to the recently published NTIA study of public broadcasting's coverage of the United States, the Bakersfield area represents 25% of the population of California that is not served by public television. NTIA, Public Broadcasting Coverage in the United States 49 (1989).

WAIT Radio v. F.C.C., 418 F.2d 1153 (1969).^{16/} In the present case, CTSC's engineering study provides precisely the kind of supporting data the court required the Commission to consider in WAIT. The Commission must now accord this data a "hard look".

In giving a "hard look," the Commission cannot ignore engineering facts. In H&B Communications Corp. v. F.C.C., 420 F.2d 638 (D.C. Cir. 1969) the Commission had granted a translator permit in spite of claims made in a petition to deny filed by a cable television operator that the operation of the proposed translator would cause substantial interference to the cable system. Although the Commission acknowledged the allegations of interference, it granted the translator construction permit and dismissed the impact of the cable operator's allegations by noting that the cable system was not entitled to protection under the Commission's rules. Id. at 639. In reversing and remanding the Commission's action, the Court noted that under its public interest obligation, the Commission could not ignore the potential interference of the translator service on the cable operation and its subscribers, even if that operation was not protected under the rules. Id. at 642.

^{16/} See also United States v. Storer Broadcasting Co., 351 U.S.192 (1955), where the Court held that under Section 309(b) of the Act, before dismissing an application that sought a waiver of the Commission's rules and set out adequate reasons for that waiver, the Commission was obliged to give the applicant a full hearing. Id. at 205.

Similarly, in Interstate Broadcasting v. F.C.C., 323 F.2d 797 (D.C. Cir. 1963), two parties filed applications for construction permits for co-channel and adjacent channel AM operations whose predicted contours would cause interference to the signal of WQXR-AM, although that interference would be outside of WQXR's protected 0.5 mv/M contour. Id. at 799. WQXR had alleged in its petitions to deny, as well as in the comparative hearings, that special circumstances justified protecting its signal outside of its normally protected contour. Id. at 801. Nevertheless, the Commission granted both construction permits, after noting in one case that no such circumstances had been shown, and after having refused to take evidence on the matter in the other. Id. at 800, 801. In reversing and remanding the Commission's actions, the Court noted that under its public interest obligation, the Commission was required to receive evidence on the alleged loss to WQXR's service, and to consider whether that loss of service was a sufficient basis for a waiver of the Commission's rules. Id. at 800, 802.

Thus, the H&B court held that the Commission could not just ignore possible interference to a present service and the Interstate Court went so far as to hold that under its public interest obligation, the Commission was obliged to consider evidence on the potential interference that formed the basis of a waiver request even when the interference was outside the station's prescribed service area. Together,

these cases show that the Commission cannot ignore engineering facts in its licensing proceedings. The Commission can no more ignore facts showing the absence of interference than those it attempted to ignore showing the existence of interference in the H&B and Interstate cases.

Conclusion

The Commission's conclusion that CTSC's Bakersfield proposal would preclude use of Channel 39 in Los Angeles is incorrect and was based in part on the Commission's refusal to consider, as CTSC requested, the effect of terrain blockage on the signal of the station it has proposed. CTSC has submitted a detailed engineering study supplementing the showing of terrain blockage, and both Commission and judicial case precedent require that the Commission reconsider its action and take CTSC's engineering study into account. Because the information in CTSC's application and waiver request, supplemented by more detailed information in the Engineering Statement attached hereto, shows that the granting of CTSC's waiver request will not contravene the policy underlying the Freeze Order, and because the granting of that waiver request and CTSC's application will serve the public interest needs of the Bakersfield community, CTSC has made more than a sufficient showing to justify its waiver request.

WHEREFORE, based on the showing herein, the Commission should reconsider its denial of CTSC's waiver request,